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No. 01-1410

In the Supreme Court of the United States

LOIS DELONG, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Under the Indian Child Protection and Family Violence Prevention Act of 1990 (Act), 25 U.S.C. 3207, as in effect at the pertinent time, the Secretary of Health and Human Services (Secretary) was required to conduct an investigation into the character of every individual employed by the federal government in any position involving regular contact with Indian children, and was required to ensure that no individual appointed to any such position had been found guilty of certain enumerated crimes, including crimes of violence. The Secretary determined that petitioner had been convicted in 1974 of assault and battery and, pursuant to Section 3207, removed petitioner from her federal position. The questions presented are:

1. Whether 25 U.S.C. 3207 requires the removal of a federal employee who was convicted of one of the enumerated crimes before the Act was enacted into law.

2. Whether petitioner's removal from her federal employment pursuant to 25 U.S.C. 3207 violated her due process rights.

3. Whether 25 U.S.C. 3207 is an unconstitutional bill of attainder or ex post facto law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bear Robe v. *Parker*, 270 F.3d 1192 (8th Cir. 2001)	12
Bell v. *Burson*, 402 U.S. 535 (1971)	10
California Dep't of Corrs. v. *Morales*, 514 U.S. 499 (1995)	14
Commonwealth v. *Clayton*, 684 A.2d 1060 (Pa. 1996)	11, 13
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998)	14
Fewquay v. *Page*, 682 F. Supp. 1195 (S.D. Fla. 1987), aff'd, 896 F.2d 558 (11th Cir. 1990)	11, 12, 13
Garland, Ex parte, 71 U.S. (4 Wall.) 333 (1866)	15
Johnson v. *HHS*, 18 Fed. Appx. 837 (Fed. Cir.), cert. denied, 122 S. Ct. 354 (2001)	4
Kansas v. *Hendricks*, 521 U.S. 346 (1997)	14
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994)	3, 7, 8
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977)	15
Pennsylvania Dep't of Corrs. v. *Yeskey*, 524 U.S. 206 (1998)	8
Peterson v. *Department of Health & Human Services*, No. A98-0264-CV (D. Alaska Sept. 27, 2000)	11
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945)	13
Selective Serv. Sys. v. *Minnesota Pub. Int. Res. Group*, 468 U.S. 841 (1984)	15
Stanley v. *Illinois*, 405 U.S. 645 (1972)	8, 9

Cases—Continued: Page

United States v. *Brown*, 381 U.S. 437 (1965) 15
Vlandis v. *Kline*, 412 U.S. 441 (1973) 8, 9
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 6, 8, 9, 10
Wills v. *Texas*, 511 U.S. 1097 (1994) 13

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 9, Cl. 3:
Bill of Attainder Clause 15
Ex Post Facto Clause 14, 15
Amend. V (Due Process Clause) 6, 12
Federal Youth Correction Act, 18 U.S.C. 5005-5026 (1982) 12
Indian Child Protection and Family Violence Prevention Act of 1990, 25 U.S.C. 3201 *et seq.*:
25 U.S.C. 3201(a)(1)(C) 6, 14
25 U.S.C. 3207 ..... *passim*
25 U.S.C. 3207(a) 7
25 U.S.C. 3207(a)(1) 2
25 U.S.C. 3207(a)(2) 2, 7
25 U.S.C. 3207(a)(3) 2
25 U.S.C. 3207(b) 2, 5, 7
Native American Laws Technical Corrections Act of 2000, Pub. L. No. 106-568, Tit. VIII, § 814(1), 114 Stat. 2918 2
5 U.S.C. 7513(a) 4, 5
Sup. Ct. R. 10(a) 12
11th Cir. R. 36-2 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 264 F.3d 1334. The final decision of the Merit Systems Protection Board (Pet. App. 15a-29a) is reported at 86 M.S.P.R. 501. The initial decision of the administrative judge (Pet. App. 30a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2001. A petition for rehearing was denied on December 21, 2001. Pet. App. 41a. The petition for a writ of certiorari was filed on March 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Indian Child Protection and Family Violence Prevention Act of 1990 (Act), 25 U.S.C. 3207, the Secretary of Health and Human Services (Secretary) must "conduct an investigation of the character of each individual who is employed, or being considered for employment," in any position with "duties and responsibilities * * * which involve regular contact with, or control over, Indian children." 25 U.S.C. 3207(a)(1) and (2). The Act further provides that the Secretary must prescribe minimum standards that such individuals must meet to be appointed to such positions. 25 U.S.C. 3207(a)(3). At the pertinent time, the Act required those minimum standards to ensure that no individuals appointed to such positions "have been found guilty of" any of certain enumerated offenses, including any crime of violence. 25 U.S.C. 3207(b).[1]

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[1] On December 27, 2000, Congress amended the Indian Child Protection and Family Violence Prevention Act. As amended, the Act now requires the Secretary to prescribe minimum standards ensuring that no individual appointed to a position with responsibilities involving regular contact with Indian children shall have been found guilty of "any felonious offense, or any of two [*sic*] or more misdemeanor offenses" falling into certain classifications, including crimes of violence. See Native American Laws Technical Corrections Act of 2000, Pub. L. No. 106-568, Tit. VIII, § 814(1), 114 Stat. 2918.

These amendments to the Act were enacted while this case was pending before the court of appeals, before the court issued its decision. After the court issued that decision, petitioner argued for the first time in her petition for rehearing that the 2000 amendments rendered the Act inapplicable to her because (she contended) her 1974 conviction was a misdemeanor, and she had not been convicted of any other disqualifying offense. At the time that the Secretary made the decision to remove petitioner from federal employment, however, the law in effect required the Secretary to

2. This case involves the Secretary's action to remove petitioner from her position with the Department of Health and Human Services (Department or HHS) because, under the Act, petitioner's previous conviction for assault and battery rendered her ineligible for employment in that position. Petitioner was employed by HHS as a substance abuse specialist. Her responsibilities included regular and unsupervised contact with Indian children and adolescents receiving treatment for chemical dependency. Pet. App. 2a. On April 19, 1999, HHS issued a notice of proposed action to remove petitioner from her position because, in 1974, she had been convicted of assault and battery. In response, petitioner submitted a letter from her legal representative as well as several letters indicating that, despite her conviction, her job performance had been satisfactory. Despite that submission, HHS determined that Section 3207 rendered petitioner ineligible for continued employment in her position as a substance abuse specialist. *Ibid.* HHS was unable to find any

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remove from employment any person who had been previously convicted of any single crime involving violence, whether the crime was a felony or misdemeanor. Because, as we explain in this brief, the Secretary's removal of petitioner was proper at the time that action was undertaken, the 2000 amendments could not be applied to petitioner's case without a determination that Congress had intended those amendments to be applied retroactively to invalidate the previously lawful removal of a federal employee. Cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). The language of the 2000 amendments nowhere suggests that Congress intended the new law to be applied retroactively. If, however, petitioner is correct in her assertion that her 1974 offense was a misdemeanor, and if she has not been found guilty of any other offenses, there is nothing in the language of the current version of Section 3207 that would preclude her from future employment in a federal government position involving contact with Indian children.

other position for petitioner that did not involve contact with Indian children. *Id.* at 14a n.2. Accordingly, HHS removed petitioner from her position effective June 4, 1999. *Id.* at 2a.

3. Petitioner appealed her removal to the Merit Systems Protection Board (MSPB or Board). An administrative judge (AJ) of the Board initially ruled that Section 3207 did not mandate petitioner's removal from federal employment, but rather, permitted HHS to consider extenuating and mitigating circumstances. Pet. App. 33a-34a. The AJ held further that, because HHS had failed to consider such circumstances in petitioner's case, and had also not considered her actual suitability for work with Indian children, her removal should not be sustained. *Id.* at 34a-35a. The AJ also held (*id.* at 35a) that, because petitioner's conviction was 25 years old and stemmed from a college campus fight between Indian and non-Indian students, HHS had failed to demonstrate that her removal "promoted the efficiency of the service," as required by 5 U.S.C. 7513(a). Accordingly, the AJ reversed the Department's removal of petitioner. Pet. App. 36a.

4. The Department petitioned for review of the AJ's decision before the full MSPB, which granted review and sustained the Department's decision to remove petitioner. Pet. App. 15a-29a.[2] The full Board concluded that Section 3207 requires the removal from a

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[2] The full Board consolidated petitioner's case with three others raising the same and related issues. See Pet. App. 16a. In one of the other cases, the employee separately petitioned for review of the Board's decision and raised issues similar to those raised by petitioner here. The Federal Circuit affirmed the Board in an unpublished decision, and this Court denied certiorari. See *Johnson* v. *HHS*, 18 Fed. Appx. 837 (Fed. Cir.), cert. denied, 122 S. Ct. 354 (2001).

position involving contact with Indian children of any individual who has been convicted at any time of one of the enumerated offenses, and that the Act does not provide for consideration of extenuating or mitigating factors. See *id.* at 21a-22a. The Board also concluded that, because the Act itself defines a nexus between an employee's failure to meet the Act's specified minimum standards of character and the employee's unsuitability for continued service in a position covered by the Act, the removal of an employee covered by Section 3207 promotes the efficiency of the service, as required by 5 U.S.C. 7513(a). See Pet. App 24a.

5. Petitioner petitioned for review of the Board's final decision in the United States Court of Appeals for the Federal Circuit. The court affirmed the Board's decision. Pet. App. 1a-14a.

a. The court first rejected petitioner's contention that Section 3207 does not apply to individuals who were already federal employees at time of the Act's passage. Pet. App. 6a-9a. Section 3207(b) requires the Secretary to ensure that "none of the individuals *appointed* to positions" involving contact with Indian children shall have been found guilty of various crimes. See 25 U.S.C. 3207(b) (emphasis added). Petitioner had argued that the Act's use of the term "appointed" confined its scope to individuals considered for appointment after passage of the Act. The court observed, however, that "current employees also may be considered to 'be appointed' [*sic*] to their positions." Pet. App. 7a.

The court also noted that Section 3207(b)'s use of the past tense to refer to individuals who "have been found guilty of" an enumerated crime "clearly requires HHS to consider crimes committed prior to enactment of the Act when determining whether an employee satisfies

the minimum standards of character." Pet. App. 8a. Moreover, the court stated, Congress's statutory finding that "multiple incidents of sexual abuse of children on Indian reservations have been * * * perpetrated by persons employed * * * by the Federal government," 25 U.S.C. 3201(a)(1)(C), reflected Congress's concern that "current federal employees may pose a threat to Indian children." Pet. App. 8a. The court also found no language in the Act to suggest that HHS would be authorized, on the basis of mitigating circumstances, to permit an employee who had been found guilty of one of the specified crimes to remain in federal employment in a position covered by the Act. See *ibid.*

b. The court rejected petitioner's contention that the application of Section 3207 to require her removal violates the Due Process Clause because it operates as an "irrebuttable presumption" to the effect that her conviction renders her unfit for federal service in any position involving Indian children. See Pet. App. 9a-13a. The court stressed that, in *Weinberger* v. *Salfi*, 422 U.S. 749, 772 (1975), this Court held that a conclusive presumption that does not abridge a fundamental right nor discriminate against a suspect class will be upheld if it "bears * * * [a] rational relation to a legitimate legislative goal." Applying that standard, the court concluded that Section 3207 does not violate petitioner's due process rights because "Congress could rationally have concluded that the minimum standards of character in § 3207 would reduce the incidence of abuse of Indian children at the hands of federal employees." Pet. App. 13a. The court also observed that, "given the difficulty of identifying employees who pose a threat to Indian children, the choice of a blanket rule is justified in this case." *Ibid.*

ARGUMENT

The court of appeals' decision, sustaining the application of Section 3207 to require petitioner's removal from covered federal employment, is correct. That decision also does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner argues (Pet. 23-26) that the application of Section 3207 to require her removal from covered federal employment is contrary to the presumption against retroactive application of federal statutes articulated in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). The court of appeals correctly concluded, however, that Section 3207 requires the removal of federal employees who were employed in covered positions at the time the Act was passed, even if their convictions predated passage of the Act.

Section 3207(a)(2) requires the Secretary to "conduct an investigation of the character of each individual who *is employed*, or is being considered for employment," in a position with responsibilities involving regular contact with Indian children. 25 U.S.C. 3207(a) (emphasis added). The Act's specific reference to any individual who is employed, *as well as* to any individual who is considered for employment in the future, makes clear that Congress intended the law to cover employees already employed by the federal government at the time of the Act's passage. In addition, Section 3207(b) expressly requires the Secretary to ensure that no individuals appointed to such positions "have been" found guilty of any offense involving, among other things, crimes of violence. 25 U.S.C. 3207(b). Congress's use of the past tense indicates that it intended to reach current employees who had previously been

found guilty of disqualifying offenses. Thus, Congress has expressly prescribed the Act's temporal reach, see *Landgraf*, 511 U.S. at 270, and has required the removal of current employees who were previously found guilty of covered offenses.

Petitioner argues that the Court should reject a "retroactive application" of Section 3207 in order to avoid "serious constitutional problems." Pet. 23-24. In the first place, the statute does not apply retroactively in any meaningful sense. The Act simply limits the prospective employment of certain individuals from the date of enactment forward. Second, as we explain below (pp. 8-11, 13-16, *infra*), the application of Section 3207 to petitioner does not raise any serious constitutional concerns. Finally, the canon of construction invoked by petitioner applies only where there is a genuine ambiguity in the statute, such that one of at least two permissible constructions of the law will avoid the allegedly unconstitutional reading. See *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 211 (1998). In this case, the Act unambiguously applies to petitioner, and there is no permissible reading of Section 3207 that would avoid that application.

2. Petitioner principally argues (Pet. 6-17) that Section 3207 impermissibly operates on the basis of an "irrebuttable presumption" that she is unfit for employment with Indian children, merely because she was convicted of assault and battery at some previous time. Petitioner relies heavily on this Court's decisions in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and *Vlandis* v. *Kline*, 412 U.S. 441 (1973). See Pet. 10-13. But as the court of appeals properly recognized (Pet. App. 9a-11a), those decisions must be read in light of this Court's later decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 767-785 (1975), which reexamined the "irrebuttable pre-

sumption" doctrine and made clear that, absent a suspect classification or an effect on fundamental rights, a legislative presumption must be upheld if it satisfies rational-basis review. The court of appeals properly analyzed and upheld Section 3207 in accordance with that standard.

In *Salfi*, the Court upheld a provision of the Social Security Act that conclusively presumed that marriages that did not take place at least nine months before the death of the beneficiary were entered into for the purpose of securing social security benefits for the surviving spouse, and on that basis denied benefits to a surviving spouse whose marriage had not preceded the wage earner's death by at least nine months. 422 U.S. at 767-768. After examining *Stanley* and *Vlandis*,[3] the Court explained in *Salfi* that an extravagant extension of those decisions could turn them into "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." *Id.* at 772. Accordingly, the Court made clear, where a presumption does not implicate a "constitutionally protected status" or important personal liberties, it need only bear a rational relation to a legitimate legislative goal. See *ibid.*

Section 3207 readily satisfies that standard, as the court of appeals concluded. Federal employment does

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[3] In *Stanley*, the Court struck down a statute that denied a hearing on parental fitness to an unwed father, even though such a hearing was granted to all other parents whose custody of their children was challenged. See 405 U.S. at 651. In *Vlandis*, the Court struck down a state statute that defined "resident" for purposes of determining state university tuition but denied those seeking to show residency the opportunity to present factors clearly bearing upon the issue of residency. See 412 U.S. at 452.

not implicate a fundamental right such as the right to raise one's children at issue in *Stanley*, and Section 3207 does not operate on the basis of any suspect classification. The only question, therefore, is whether the minimum standards of character articulated in Section 3207, identifying convictions for certain classes of offenses as rendering the individual unsuitable for employment in a position with responsibilities involving Indian children, is rationally related to the government's interest in protecting Indian children from abuse. Pet. App. 12a-13a. It was not irrational for Congress to conclude that the protection of a particularly vulnerable population of children warranted exclusion from employment of all persons previously convicted of crimes involving violence, even if those persons might be able to show in their individual cases that they had been rehabilitated. Although Congress might have taken a different approach, "Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce." *Salfi*, 422 U.S. at 785.

Petitioner also relies on *Bell* v. *Burson*, 402 U.S. 535 (1971), to argue that Section 3207 deprives her of due process. The due process concerns expressed by the Court in *Bell*, however, are remote from this case. *Bell* involved a legislative scheme under which an uninsured motorist involved in an accident was required to post security to cover the amount of damages being claimed against him, or suffer suspension of his driver's license. The State refused to allow the motorist to present evidence concerning his fault in the accident or the likelihood that he would not be found liable in damages

in order to avoid or mitigate the obligation to post security. This Court ruled that the State's refusal to entertain such evidence violated procedural due process. In so ruling, the Court emphasized that the driver's fault in the accident was relevant to the ultimate question (to be determined in a later adjudication) whether the driver was liable in damages for an injury caused by the accident (and whether his license would be suspended as a result). Because it was "clear that liability, in the sense of an ultimate judicial determination of responsibility, play[ed] a crucial role in the" statutory scheme, the Court determined that the State could not prevent the driver from presenting evidence going to that central issue. *Id.* at 541. Under Section 3207, by contrast, there is no ultimate issue of the employee's "fault" to be resolved through adjudication to establish whether the employee is suitable for federal employment involving Indian children. Rather, Section 3207 itself reflects a congressional policy determination that individuals who have been found guilty of certain classes of crimes may not be appointed to such positions.

3. Petitioner argues (Pet. 6-10) that the decision below conflicts with decisions of other lower courts, namely, *Peterson* v. *Department of Health & Human Services*, No. A98-0264-CV (D. Alaska Sept. 27, 2000); *Fewquay* v. *Page*, 682 F. Supp. 1195 (S.D. Fla. 1987), aff'd, 896 F.2d 558 (11th Cir. 1990) (Table); and *Commonwealth* v. *Clayton*, 684 A.2d 1060 (Pa. 1996). Only *Peterson*, however, involved Section 3207. In that case, a district court invoked the "irrebuttable presumption" concept to rule that the application of Section 3207 to require the employee's removal in that particular case

violated the Due Process Clause.[4] For the reasons we have given, the district court's reliance on "irrebuttable presumption" reasoning was erroneous. The district court's unreviewed decision in *Peterson*, however, does not constitute a conflict among the courts of appeals that would warrant this Court's review under the Court's Rule 10(a).[5]

Fewquay involved a Florida statute similar to Section 3207, which precluded any person who had been found guilty of felony bank robbery from employment in any state program providing care to children. See 682 F. Supp. at 1197. The district court invalidated the state statute, relying on *Stanley* and *Vlandis*. See *id.* at 1198. The Eleventh Circuit affirmed the district court's decision without issuing a published decision of

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[4] For the convenience of the Court, we have lodged a copy of the district court's decision, as well as its order on the government's motion for reconsideration, in *Peterson*. The district court's order on reconsideration clarified that it had not intended to hold Section 3207 unconstitutional. In light of that clarification, the government did not seek further review of that decision.

[5] The only other court of appeals decision that has examined similar issues under Section 3207 has reached a result consistent with the decision below. In *Bear Robe* v. *Parker*, 270 F.3d 1192 (8th Cir. 2001), the court of appeals upheld the dismissal under Section 3207 of an employee of an entity that received federal funding. In that case, the employee had been convicted in 1975, at age 20, of voluntary manslaughter, and his conviction had been set aside pursuant to the Federal Youth Correction Act, 18 U.S.C. 5005-5026 (1982) (repealed 1984). Nonetheless, the court of appeals ruled that the employee's conviction barred him from employment involving contact with Indian children, and cited the decision of the court of appeals in this case for the proposition that "Congress has adopted a bright line rule that persons who fall within the Act's proscriptions are not to be employed in positions that involve regular contract with children in federally funded Indian schools." 270 F.3d at 1195.

its own. 896 F.2d 558. That decision by the court of appeals, however, is not binding precedent in the Eleventh Circuit. See 11th Cir. R. 36-2. Accordingly, *Fewquay* also does not establish a conflict in the circuits warranting this Court's review.

In *Clayton*, the Pennsylvania Supreme Court relied on "irrebuttable presumption" decisions (including this Court's decisions in *Stanley* and *Vlandis*, as well as *Bell*) to hold unconstitutional a state statute that required the suspension of a driver's license for one year upon the occurrence of a single epileptic seizure. See 684 A.2d at 1062-1065. That decision does suggest some lingering uncertainty about the continuing validity and scope of an "irrebuttable presumption" doctrine. Nonetheless, the difference in approach between *Clayton* and the decision below does not warrant this Court's review, given the considerably different statutory contexts in which the two cases arose. It would be more appropriate for this Court to consider reexamining this area of the law when and if a significant conflict emerges in the courts of appeals or among state supreme courts in a particular context about the validity or application of the "irrebuttable presumption" rule.

4. Petitioner argues that Section 3207 is an unconstitutional bill of attainder and ex post facto law. Petitioner raised those contentions for the first time in her petition for rehearing in the court of appeals, which did not address them. Because those claims were neither properly presented to, nor passed on by, the court of appeals, they are not properly before this Court. Cf. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Wills* v. *Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in denial of certiorari). In any event, the contentions are without merit.

The Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, "forbids the application of any new punitive measure to a crime already consummated." *California Dep't of Corrs.* v. *Morales*, 514 U.S. 499, 505 (1995). A prerequisite to any conclusion that a law violates the Ex Post Facto Clause is a determination that the challenged law is in fact "punitive," for the Clause "has been interpreted to pertain exclusively to penal statutes." *Kansas* v. *Hendricks*, 521 U.S. 346, 370 (1997). Section 3207 lacks the hallmarks of a penal statute. The Act's purpose is the protection of Indian children, based on Congress's finding that children on Indian reservations had been abused by federal employees in the past. 25 U.S.C. 3201(a)(1)(C). The Act does not purport to impose additional penal measures on persons who have previously been found guilty of particular crimes. It does not, for example, require additional detention or the imposition of an *in personam* penalty such as a fine. Although the Act does render persons previously found guilty of certain offenses disqualified from specified positions in federal employment involving contact with Indian children, it is no different in that sense from innumerable statutory provisions that exclude persons convicted of certain crimes from sensitive positions in governmental service, and the Act does not disqualify those persons from *all* federal employment.[6]

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[6] Petitioner relies (Pet. 18) on Justice Thomas's concurring opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), in which he suggested (*id.* at 538-539) that the Court should reconsider its longstanding jurisprudence that "has considered the *Ex Post Facto* Clause to apply only in the criminal context." The Court has not adopted that suggestion, however, and the lead opinion in *Eastern Enterprises* observed that "the *Ex Post Facto* Clause is directed at the retroactivity of *penal legislation*." *Id.* at 533 (opinion of O'Connor, J.) (emphasis added).

Similarly, petitioner's contention (Pet. 19-23) that Section 3207 is a bill of attainder is without merit. Petitioner relies on cases such as *United States* v. *Brown*, 381 U.S. 437 (1965), and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), in which the Court invalidated statutory provisions that disqualified a class of persons from certain forms of employment. But as this Court made clear in its later extensive reexamination of the Bill of Attainder Clause, U.S. Const. Art. I, § 9, Cl. 3, those decisions rest in large part on the fact that the burdened class of persons had been "legislatively branded as disloyal." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977). No such pejorative label has been affixed to petitioner.

The Court has also made clear that a legislative enactment imposing "new burdens and deprivations" will not violate the Bill of Attainder Clause if the law "reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475-476; see *Selective Serv. Sys.* v. *Minnesota Pub. Int. Res. Group*, 468 U.S. 841, 851-852 (1984). As we have explained, the purpose of Section 3207 is to protect the vulnerable population of Indian children, not to impose additional punitive consequences on persons such as petitioner. Petitioner evidently is of the view that the class of persons disqualified by Section 3207 for employment with Indian children is too broad, but Congress was not constitutionally disabled from taking an arguably somewhat overprotective prophylactic approach in order to ensure that the problem of abuse of Indian children would not recur. At a minium, the reach of Section 3207 is not so broad that it cannot be said to "reasonably * * * further" Congress's indisputably legitimate and nonpunitive goal of protecting Indian children from abuse by federal employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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